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MEMORANDUM

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FROM
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Jim Taylor

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The following article appeared in the May 1965 issue of the Canadian Bar Review. It may be interesting to examine it in conjunction with the studies by Peter Russel and Claude-Armand Sheppard.

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BI-LINGUALISM IN CANADIAN STATUTES

JOHN D. HONSBERGER*
Toronto

Canada's existence as a separate state in North America is based upon the co-existence of the English and French speaking Canadians. The history of Canada is a record of the compromises that this co-existence has required. An important constitutional compromise has been section 133 of the British North America Act[1] which provides for the use of both the English and French languages in the Houses of Parliament of Canada and in the Quebec legislature and for the printing and publication of the Acts of Parliament and of the Legislature of Quebec in both languages. This has been one of the most important areas of bilingualism in Canada in the sense of the joint use of the two languages rather than an alternative use of one or the other. With the publication of the interim report of the Royal Commission on Bilingualism and Biculturalism and the possibility of the early repatriation of the Canadian Constitution, it is perhaps timely to trace the history of section 133 of the British North America Act and to consider the role in Canada of the two official languages with particular reference to the publication and interpretation of statutes.

I. *Historical Background.*

The Quebec Act of 1774[2] was intended to make Canada a French province. It was a charter of privileges which recognized and accepted the colonial society established by France in Canada. In the words of Burke[3] "the only difference is, they shall have George the Third for Louis the Sixteenth". New forces, however, began to work in the colony with the coming in numbers of the British Americans, particularly after the American Revolution. The pressure of the new colonists for modification of the Quebec Act pre-

*John D. Honsberger, of the Ontario Bar, Toronto.

[1] (1867), 30 & 31 Vict., c. 3.

[2] (1774), 14 Geo. III, c. 83.

[3] J. Wright, Cavendish's Debates. . . . On the Bill for making more effectual provisions for the Government of the Province of Quebec (1839), p. 289.

(3) Notwithstanding anything in this or any other Act, the legislature of a province may make laws in the province in relation to any matter coming within the legislative jurisdiction of the Parliament of Canada.

(4) No statute enacted by a province under the authority of subsection (3) of this section shall have effect unless

(a) prior to the enactment thereof the Parliament of Canada has consented to the enactment of such a statute by the legislature of that province, and

(b) a similar statute has under the authority of subsection (3) of this section been enacted by the legislatures of at least three other provinces.

(5) The Parliament of Canada or the legislature of a province may make laws for the imposition of punishment by fine, penalty or imprisonment for enforcing any law made by it under the authority of this section.

(6) A consent given under this section may at any time be revoked, and

(a) if a consent given under subsection (1) or (2) of this section is revoked, any law made by the Parliament of Canada to which such consent relates that is operative in the province in which the consent is revoked shall thereupon cease to have effect in that province, but the revocation of the consent does not affect the operation of that law in any other province, and

(b) if a consent given under subsection (4) of this section is revoked, any law made by the legislature of a province to which the consent relates shall thereupon cease to have effect.

(7) The Parliament of Canada may repeal any law made by it under the authority of this section, in so far as it is part of the law of one or more provinces, but if any repeal under the authority of this subsection does not relate to all of the provinces in which that law is operative, the repeal does not affect the operation of that law in any province to which the repeal does not relate.

(8) The legislature of a province may repeal any law made by it under the authority of this section, but the repeal under the authority of this subsection of any law does not affect the operation in any other province of any law enacted by that province under the authority of this section."

PART III

French version

14. The French version of this Act set forth in the Schedule shall form part of this Act.

PART IV

Citation and Commencement

15. This Act may be cited as the *Constitution of Canada Amendment Act*.

16. This Act shall come into force on . . . day of . . . .

vailed. The Constitutional Act of 1791[4] which was the result of this pressure had the effect of dividing Canada into two almost independent colonies of Upper Canada and Lower Canada.

In Lower Canada the first speaker of the Legislative Assembly was Jean Antoine Panet. Although he was elected after a division based almost entirely on racial lines, there was an interesting, but unsuccessful attempt through the leadership of his brother to adopt the rule that the speaker should be bilingual and that the Governor should be addressed in English as the general language of the Empire.[5] Although the attempt failed, it soon became the rule that, if the speaker was bilingual all motions should be read in both English and French. If he was not fluent in both languages, he was required to read the motions in the language most familiar to him and his clerk or deputy would read them in the other language. The Assembly however, resisted an attempt to make English the language of enactment and the legal language in Lower Canada although supported by the plea of imperial unity and the argument that a subordinate legislature could not change the language of the law. As a compromise to the suggestion that French then should be the language of enactment, it was agreed that in the future all bills relating to the criminal law and the protestant clergy would be introduced in English while bills relating to the laws and usages of the province would be introduced in French. All bills however, were to be enacted in the English language.[6]

Not unnaturally, there was considerable jealousy between the French and English factions in the Lower Canada Assembly. For a time, this was held in check by the good will and patience of the members. Soon however, the Assembly became a forum for French Canadian nationalism. Within a few years, the editor of the *Quebec Mercury*, which was founded in 1805, was writing: "This province is already too French for a British colony. Whether we are at war or in peace, it is essential that we should strive by all means to oppose the growth of the French and of their influence." These were fighting words which were not unchallenged. The French party under the leadership of Panet, the speaker in the Assembly retaliated. In November 1806 the first number of

[4] (1791), R.S.C., 1952, Vol. VI, p. 6141.

[5] Quebec Gazette, December 20th, 1792.

[6] W. P. M. Kennedy, The Constitution of Canada (1922), p. 89 *et seq.*, in which reference is made to "Les débuts du Régime Parlementaire: La question de langue." Thomas Chapais, Le Canada Français, Sept.-Oct.1918 pp. 11 *et seq.*, 95 *et seq.* and A. C. Doughty and D. McArthur, Documents Relating to the Constitutional History of Canada, 1791-1818 (1918), p. 105.

Le Canadien appeared and adopted as its motto, "Notre langue, nos institutions, et nos lois".

With the more agressive tactics of the French Canadian party in the Assembly, the government came almost to a standstill. It was the opinion of Chief Justice Jonathon Sewell that "the province must be converted to an English colony or it will be ultimately lost". For a moment the British Government flirted with the possibility of prohibiting the use of French in the Assembly. A bill was introduced in the House of Commons in June of 1822 by the secretary for the colonies which would have greatly limited the franchise and after a period of fifteen years would have made English the parliamentary language.[7] The bill was subsequently withdrawn. The gathering storm abated. It was to break however, with the troubles of 1837 after which Lord Durham in his *Report on the Affairs of British North America* advised that the Canadas should be re-united under one government. He made it clear that it was not a legislative union that he had in mind, but a complete fusion. "The French Canadians were to be absorbed, amalgamated, absolutely united."[8] "I entertain no doubts", wrote Lord Durham, "as to the national character which must be given to Lower Canada; it must be that of the British Empire.[9] . . . The alteration of the character of the province ought to be immediately entered on, and firmly though cautiously followed up: that in any plan which may be adopted for the future management of Lower Canada, the first object ought to be that of making it an English Province, and that, with this end in view, the ascendancy should never again be placed in any hands but those of an English population".[10] French Canada was to be anglicized. Everything French Canadian except religion was to be wiped away.

The Act of Union of 1840,[11] was the direct result of Lord Durham's Report. The provisions of the Act relating to the use of the English language illustrate the extent that the British Government adopted Durham's advice to anglicize French Canada. Section XLI provided:

> And be it enacted, that from and after the said re-union of the said two provinces all writs, proclamations, instruments for summoning and calling together the legislative council and legislative assembly of the Province of Canada, and for proroguing and dissolving the same, and all writs of summons and election and all writs and public instruments whatsoever relating to the said Legislative Council and Legislative Assembly, or either of them, and all returns to such writs and instruments, and all journal entries and written or printed proceedings of what nature soever, of the said Legislative Council and Legislative Assembly, and each of them respectively, and all written or printed proceedings and reports of committees of the Legislative Council and Legislative Assembly, respectively, *shall be in the English language only*:[12] provided always, that this enactment shall not be construed to prevent translated copies of any such document being made, but no such copy shall be kept among the Records of the Legislative Council or Legislative Assembly or be deemed in any case to have the force of an original record.

[7] W. P. M. Kennedy, ed., Documents of the Canadian Constitution, 1759-1915 (1918), p. 307 *et seq.*
[8] Kennedy, *op. cit.*, footnote 6, p. 174.
[9] Report, vol. ii, p. 288.
[10] *Ibid.*, p. 265.
[11] (1840), 3 & 4 Vict., c. 35 (Imp.): An Act to Re-unite the Province of Upper and Lower Canada and for the Government of Canada.

The harshness of the Act of Union in respect to the use of the French language was soon modified. Lord John Russell explained that the Act only dealt with English as the language of "original record". Certainly nothing was said in the Act against the use of French as the language of debate. French was in fact used as such from the time of the first united Parliament. The first speaker was French. The rules of procedure in the Assembly provided for the translation of papers and for the reading of motions in both French and English.[13] One of the first bills to be presented in the new united Parliament was An Act to Provide for the Translation into the French Language of the Laws of This Province and for other Purposes Connected Therewith,[14] which stated in part that:

> Whereas it is just and expedient that the laws passed by the Legislature of this Province as well as the Acts of The Imperial Parliament, relating to this province be translated into the French language for the information and guidance of a great portion of Her Majesty's subjects in this Province. . . .
>
> And it is hereby enacted . . . that it shall be lawful for the Governor or person administering the government of this Province, to appoint one proper and competent person, versed in legal knowledge and having received a classical French education and possessing a sufficient knowledge of the English language, to translate into the French language the laws passed by the legislature of this Province or The Imperial Parliament relating to or affecting this Province.
>
> And be it enacted, that the said translation shall be printed under the direction of the Executive authority and be distributed among the people of this province speaking the French language, in the same manner in which the English Text of the said laws shall be printed and distributed among those speaking the English language and under the same provisions.

[12] Italics mine.
[13] Standing Rules and Regulations of the Legislative Assembly of Canada (Kingston, 1841).
[14] (1841), 4 & 5 Vict., c. 11.

Lord Sydenham, the first governor general of the united provinces, who unfortunately acted as if he had a personal quarrel with all French speaking Canadians, died in September of 1841. His successor, Sir Charles Bagot, concerned himself with establishing the union government on a wider base by enlisting the support of the French Canadians which Sydenham had spurned. In a confidential despatch to Lord Stanley concerning Sydenham's regime, Bagot wrote:[15] "Towards the French Canadians his conduct was very unwise. He made enemies of them unnecessarily at a time when he should have propritiated them and diminished their objections to the Union. He treated those who approached him with slight and rudeness and thus he converted a proud and courageous people, which even their detractors acknowledge them to be, into personal and irreconcilable enemies. He despised their talents and denied their official capacity for office."

In his attempts to conciliate the French Canadians, Bagot proceeded with the translation of all statutes into French and appointed a number of French Canadians to the higher courts. In the 1844-1845 session of the legislature an Act to Provide for the Distribution of the Printed Copies of the Laws was passed. This Act provided in section III:[16]

> And be it enacted, that Her Majesty's Printer from time to time hereafter, shall immediately after the close of each session of the Provincial Parliament or so soon after as may be practicable deliver or transmit by post, or otherwise, in the most economical mode, the proper number of the printed copies of the Acts of the legislature of the said Province in the English language or French language, or both languages to be printed by him at the public expense to the parties hereinafter mentioned, that is to say . . . .

In 1847 Lord Elgin arrived in Canada as Governor General. At the opening of the first legislature after his arrival, he read for the first time the speech from the throne in both languages and announced that thereafter French and English would be official languages in the legislature.

Although the statutes of the united provinces had been translated into French, in 1859, when it was decided to consolidate the statutes of Upper Canada, section 13 of an Act Respecting the Consolidated Statutes for Upper Canada stated:[17]

> It shall not be necessary that the said consolidated statutes for Upper Canada be translated into French; but the Governor may, in his dis-

[15] Bagot to Stanley, September 26th, 1842. Bagot correspondence, M. 163, p. 211 (Canadian Archives) quoted by W. P. M. Kennedy, The Constitution of Canada (1922), p. 207.

[16] (1844-45), 7 & 8 Vict., c. 68

[17] (1859), 22 Vict., c. 30.

cretion cause a translation to be made and printed at any time hereafter.

The harshness and some of the disparities created by the Act Union went in time. The suspicions of the French Canadians the English speaking Canadians and of their motives remained. ne Act of Union failed because it ignored the realities of a bi- ultural and bilingual country. In any future constitution, guar- atees concerning the use of the French language would be de- anded.

In the Quebec Resolutions of 1864, it was agreed that:[18]

> Both the English and French languages may be employed in the general parliament and its proceedings and in the local legislature of Lower Canada and also in the Federal Courts and in the Courts of Lower Canada.

The old concept which had English as the language of "original cord" with all the proceedings then being translated into French at had developed after the Act of Union would be abandoned. ith confederation there would be two official languages in the anadian Parliament, the Quebec legislature and the Federal urts. The history of the united provinces with the attempted uppression of the French language by the Act of Union made nything less than two official languages in the federal Parliament nd in the Quebec legislature impossible and unrealistic. Lord arnarvon explained in the debate in the House of Lords on the itish North America Act that:[19]

> Lower Canada is jealous and, with good reason, proud of its ancestral customs and traditions; it is attached to its own institutions and will enter the Union only on the clear understanding that it shall keep them.

In London in December of 1866, the delegates from British orth America gathered for their third pre-confederation confer- ce at the Westminster Palace Hotel in order to frame the res- utions upon which the British Government should act. When e resolutions were adopted, at least six drafts were prepared be- re a final draft bill was printed. In the process of revision the inal resolution relating to the use of the English and French uages was extended and the provisions for their use were d out with greater particularity. The revision which became ion 133 of the British North America Act provided:[20]

> Either the English or the French language may be used by any person in the debates of the Houses of the Parliament of Canada and

S. 46. Par. Papers, Vol. 37 (presented to both Houses of Parliament February 1865).

Parliamentary Debates (1867), p. 568.

Supra, footnote 1.

> of the Houses of the Legislature of Quebec; and both these languages shall be used in the respective records and journals of those Houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any Court of Canada established under this Act, and in or from all of any of the Courts of Quebec.
>
> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

The effect of section 133 [illegible] North America Act was to give equal status to th[illegible] [illegible]uages in the Houses of Parliament, the Legislature of Q[illegible] [illegible] court of Canada established under the Briti[illegible] [illegible] Act. The courts which have been so e[illegible] [illegible] Court of Canada, The Exchequer Court, The Admiralty Court, The Bankruptcy Court and Military courts.

Since Confederation, the provisions of [illegible]n 133 have been observed strictly in the legislative process in both the federal Parliament and the Quebec legislature. In some small degree it might be said that the federal government has been more concerned with the letter of the law in this respect instead of its spirit and intent. Although there is no prohibition against the use of French in the provinces other than Quebec, the official use of the French language has not been adopted in any other province except for Manitoba during the years between 1870 and 1890.

In the Manitoba Act, 1[illegible] [illegible] and [illegible] were made official languages. Section [illegible] states:

> [illegible] person [illegible] and both these languages [illegible] journals of those Houses; [illegible] by any person or in any [illegible] [Ca]nada establish[illegible] from all or any [illegible] shall be printed and published in both those languages.

The role of French as an official language in Ma[illegible] came [illegible] Act to Provide that [illegible] [langua]ge of the Prov[illegible]

> [illegible] to the cont[illegible] [illegible] used in [illegible] Province [illegible]
>
> acts of the legislature of the Province of Manitoba need only be [print]ed and published in the English language.

II. *The Legislative Process.*

In the federal Parliament when a bill is introduced it is [printed] and distributed in both an English and a French version. Rule 74 of the Standing Rules of the House of Commons directs that "All bills shall be printed before the second reading in the French and English languages."[23] Each version of the bill passes through the parliamentary stages together. Royal assent is given to both versions so that for all federal statutes there is in fact a statute in the English language and a statute in the French language. Each statute is a separate and independent statute. Neither statute is considered superior or inferior to the other and it is not proper to refer to one statute as being a translation of the other. The only difference between the two statutes is in the order of the subsections in the interpretation clause if any. In the English language version the sections are in alphabetical order according to the word defined. In the French language version, the order of the sections follows the same order as in the English version. When the statutes are published the Act Respecting the Publication of Statutes[24] requires that each volume of statutes shall be printed in the English and French languages respectively.

In the Quebec legislature, until the session of 1942 when a bill was introduced, it was printed and distributed in the form of two bills, one in the French language and the other in the English language in much the same manner as in the federal Parliament. Since the third session of the twenty-second legislature in 1942, the French and English versions of a bill are printed in two columns on the same sheet of paper or in the same booklet with the French language version in one column and the English language version in the other. This innovation was introduced without any c[hange] in the rules for rule 535 of the Rules of the Quebec legislature provided only that "Every bill shall be printed and distributed in the French and English languages before being proposed to be read a second time . . . ".

When a bill is given Royal assent in Quebec, the Clerk of the Legislative Assembly, acting as Clerk of the Crown in Chancery, in the presence of the Lieutenant-Governor and the re[presenta]tive of both houses of the legislature reads the title of each bill, alternating between French and English. The bills are then placed

[illegible]

[23] Beauchesne's [illegible]

[24] R.S.C., 1952, c. 230.

on a table and the Clerk of the Legislative Council, acting as Clerk of Parliament, places his right hand on the bills and says the following words:

> Au nom de Sa Majesté, l'honorable Lieutenant-Gouverneur sanctionne ces bills.
>
> In Her Majesty's name, the Honourable the Lieutenant-Governor assents to these bills.

When the Clerk of the Legislative Council certifies bills, he uses the following stamp:

Copie conforme du statut de Quebec Sanctionné le	True copy of the Statute of Quebec Assented to on
et dont l'original est aux archives de mon bureau	the original of which is of record in my office

Greffier de la Législature
Clerk of the Legislature

III. *Interpretation of Statutes Published in the Two Official Languages.*

To expect each version of every statute to always say and mean the same thing, is a standard of perfection which is difficult to attain and maintain. Both versions of the statute should be consulted to minimize errors in interpretation. The present method of printing federal statutes in separate volumes makes this difficult. The practice in Quebec of publishing the two versions of a statute side by side is preferable and one would hope that the federal government will adopt the same practice soon. A suitable occasion to change this practice is on the publication of the next Revised Statutes of Canada presently expected to be in 1966 or 1967. It would seem too that not only does the Quebec practice make it easier to interpret statutes, but it is more in the spirit of section 133 of The British North America Act.

Occasionally one version of a statute does not say and mean the same as the other version. When this does happen and is discovered, an amending statute affecting the one version only is passed.[25] The amending statute appears in both languages but it affects only the one version.

[25] The following are examples of amending statutes affecting one version only of a statute: An Act to Amend the Criminal Code (French Version), S.C., 1920, c. 24; An Act to Amend the Special War Revenue Act, S.C., 1936, c. 45, s. 13; An Act to Amend the Canada Elections Act, S.C., 1955, c. 44, s. 1; An Act to Amend the Criminal Code, S.C., 1957-58, c. 28, s. 1; An Act to Amend the Income Tax Act, S.C., 1955, c. 54, s. 18; An Act to Amend the Customs Tarriff and The New Zealand Trade Agreement Act, 1932, S.C., 1959, c. 12, s. 2. An example of a Quebec statute amending one version only of a statute is An Act to Amend the Gas and Water Companies Act, S.Q., 1964, c. 63, s. 3.

The difficulties facing parliamentary draftsmen who must draft legislation in two official languages are great. This is true even if the draftsman is using one language only, but knows that his draft of a bill is to be translated into another language. Not only are the words and syntax different in the two languages but so often too is the approach and psychological perspective.[26] One is not quite the same person when one speaks in another language. A bill cannot be translated successfully from one language to another unless at the drafting stage the language used in the first draft is chosen with the view to it being translated easily into another language. From the beginning, pitfalls in translation must be anticipated so that the bill will read well in both languages. It is an elementary rule in the drafting of legislation that the language should be as simple and free from technical expressions as is possible. This is particularly desirable when the legislation is to be enacted and published in two or more languages.

Much clumsy sentence structure found in statutes translated from another language is a result of a too literal translation of the original version. Often a technical word or expression may be almost meaningless when literally translated. For example, the term "latent defaults" in the English version of the Water Carriage of Goods Act[27] is translated literally into "défauts latents" in the French version. Without a knowledge of English, this expression can be understood only with difficulty. The meaning would be readily understood however if the expression "vices cachés" had been used instead.

The French version of the Income Tax Act[28] is a particularly difficult Act to read. By reason of much literal translation of technical terms, there are sections in the French version which are not only awkwardly written and difficult to understand but are occasionally misleading. Indeed the French version of some parts of many federal statutes is often no more than a collection of French words but is not good French.[28A]

[26] Jean Jacques Bertrand, in the Quebec Legislative Assembly on May 8th, 1963, when he was speaking on a motion introduced by him for the establishment of a special committee to study the best way to summon and assemble the "Estates-General of the French Canadian Nation" which when once formed would determine the objectives to be pursued in the preparation of a new constitution and the best ways of attaining these objectives.

[27] R.S.C., 1952, c. 291, Art. IV, s. 2(p).

[28] R.S.C., 1952, c. 148, and see *In re Walter Crassweller* (1949), 1 T.A.B. I, at p. 42 *et seq.*

[28A] See s. 9 of the An Act to amend the Canadian World Exhibition Corporation Act, S.C., 1963, c. 32 which adds a clause 18A. The French version of paragraph 3 of this section is very clumsy. It reads in part as

The process of translation is undoubtedly complex and requires great sensibility.

> The precise mental process of translating a word or sentence spoken or written in one language into another language is or may be somewhat complex. In fact, to say that you translate one word by another seems to me to be a summary method of stating a process, the exact nature of which is a little obscure. A substantive word is merely a symbol which unless it be part of a tale told by an idiot, signifies something. If that something is a concrete object such as an apple or a particular picture, the process of translation from one language to another is easy enough for any one well acquainted with both languages. Where the words used signify not a concrete object, but a conception of the mind, the process of the translation seems to be to ascertain the conception or thought which the words used in the language to be translated conjure up in his own mind, and then, having got that conception or thought clear, to re-symbolize it in words selected from the language into which it is to be translated. A possible danger, when the document to be translated is one on which legal rights depend, is apparent, inasmuch as the witness who is in theory a mere translator may construe the document in the original language and then impose on the court the construction at which he has arrived by the medium of the translation which he has selected.[29]

To obtain a good translation of a bill, a translator should have the authority to cut or recast sentences and in general to make a free translation. It is desirable that the translator should be a lawyer. If this is not possible both versions of a bill should be scrutinized by a panel of bilingual law officers to ensure that the language of the translated version has the same spirit or genius as the original version. In this regard errors in translation can be detected more frequently if the bill in each of its versions is published side by side as in Quebec.

In general there would seem to be more care given in Quebec to be sure that the French and English versions of a statute read equally well. Government bills are drafted with a knowledge that the language used must be translated into the other official language. When the bill is translated, the translation is under the supervision of lawyers who are required to pass not so much on the

follows: ". . . une marque, un mot ou une abréviation d'un mot, un symbole, un emblème, un insigne ou un dessin sont réputés s'appliquer (a) à des articles ou marchandises, *lorsqu'ils y sont apposés, ou apposés* sur un emballage qui les renferme . . . ." (Italics mine).

For another example see section 4 of Bill C. 123, the Crown Corporations (Provincial Taxes and Fees) Act, now S.C., 1964, c. 11, which in the French version states in part: ". . . le gouverneur en conseil peut se prononcer sur la question de *savoir si ou dans quelle mesure*, selon le cas, cette taxe ou ce droit est réputé aux fins de la présente loi une taxe ou un droit décrit audit article." (Italics mine).

[29] *Dies* v. *British and International Mining and Finance Corporation Ltd.*, [1939] 1 K.B. 724, at p. 733, per Stable J.

language used but whether the spirit has been correctly translated and whether each version reads well. In Ottawa, much of the translation of bills is done by official professional translators who are not lawyers and who are without the same critical supervision of lawyers concerned with a proper translation of the spirit of the original draft. While recognizing the dangers of generalization, it is generally true that the language and style of French language federal statutes unfavourably compares with the English language version of Quebec statutes. In the current revision of the federal statutes, special attention should be given to improving the language and syntax of the French version of the statutes and in removing many of the "anglicisms".[30]

The Canadian experience with two official languages is not unique. Other countries, such as South Africa, Switzerland and Belgium and the United Nations are faced with the same or greater difficulties. What makes the role of parliamentary counsel for Canadian federal and Quebec provincial legislation uniquely difficult is the combination of the two official languages and the combination of the concepts and the tradition of the common and civil law. A "settlement" for example, is a term familiar to the common law, but foreign to the civil law, while a "dette alimentaire" or a "hypothec" are familiar terms in the civil law but foreign to the common law. To make things even more difficult, an expression or limit of measurement, common to both the English and French languages and both systems of law, such as a "foot" or a "cent" may mean one thing in French and another in English and one thing in federal legislation and another in Quebec legislation.

In France, prior to the establishment of the metric system in 1801, "le pied de Paris" was the unit of linear measurement which equalled 1.06575 English feet. "Le pied de Paris", or the French foot to distinguish it from the English foot was uniformly used in all conveyances in French Canada prior to the conquest and afterwards in the case of old titles. New patents granted by the British Crown after the conquest used the English foot as the unit of measurement. This somewhat confusing situation was codified

[30] The South African government has also been criticized for the quality of its statutes translated from one language to the other. When the Afrikaans version of the new constitution was presented recently, it was said by critics to be "crawling with anglicisms", although in other respects it was said to have constructions found not in English but in Dutch, yet still not at home in Afrikaans. See E. Kahn, The New Constitution (1961), 28 South African L. Rev. 244.

by the government of Lower Canada by the Act Respecting Weights and Measures,[31] which in part provided:

> Art. 3 (6) The Paris foot, hereinbefore mentioned, with its parts and multiples and proportions, shall be the standard measure of length in Lower Canada, for measuring all land and lots of ground granted or sold prior to the conquest of this province, or since granted or sold or to be granted or sold by the arpent or foot or the parts multiples of proportions therefore. . . .
> (7) The English foot, hereinbefore mentioned with its parts, multiples and proportions shall be the standard measure of length in Lower Canada for measuring all lands granted or hereafter granted by the British Crown, or any division thereof heretofore or hereafter made. . . .

The Act Respecting Weights and Measures was the law of Lower Canada when the Civil Code of Quebec was enacted on September 18th, 1865 and proclaimed on May 26th, 1866.[32] Article 536 of the Code provides that:

> One neighbour cannot have direct views or prospect-windows, nor galleries, balconies or other like projections overlooking the fenced or unfenced land of the other; they must be at a distance of six feet from such land.

Having regard to the fact that the first federal statute concerning weights and measures which prescribed the English foot as the unit of linear measurement was not enacted until 1871,[33] does the "six feet" referred to in article 536 refer, in all cases, to six French feet or six English feet—six French feet, being equivalent to 6.3945 English feet? It is by no means certain what is the proper interpretation. By section 91[34] of the British North America Act the federal Government was given the exclusive jurisdiction over weights and measures. The federal statute of 1871, however, could not have the effect of amending the Civil Code nor could a statute passed some six years later be used as any guide in interpreting the earlier statute. The practical result is that in the Eastern Townships, where most of the titles originate in patents from the British Crown, some mortgage companies will accept a title based upon a right of view of six English feet while other companies dealing with the same titles require a right of view of six French feet.[35]

The cent, the smallest Canadian coin has also caused some

[31] 1861, Cons. Stat. L.C., c. 32.
[32] (1866), 29 Vict., c. 41, Art. 6.
[33] See now Weights and Measures Act, R.S.C., 1952, c. 292.
[34] S. 91 (17).
[35] See, P. La Chanée, Six pieds anglais ou six pieds français (1958), 18 R. du B. 383 and A. Mayrand, L'inconvénient d'avoir deux pieds (1958), 18 R. du B. 387.

difficulty to the purists among parliamentary draftsmen. The derivation of the English word "cent" is the French "cent" meaning one hundred. In the Currency Mint and Exchange Fund Act[36] it is provided that the monetary unit of Canada is the dollar and that the denomination of money in the currency of Canada shall be dollars, cents and mills with the cent being one hundredth of a dollar and the mill one tenth of a cent. In the French version of the statute the word "cent" is also used. In Quebec, however, the word "centin" is used in the French version of statutes when "cent" is used in the English version. In the Interpretation Act[37] of Quebec it is stated that "the word 'centin' used in the French version of the Laws of the Province means the coin called 'cent' in the Laws of Canada and in the English version of the laws of this province". The result is that in our French language statutes we have two words meaning the same coin while in the spoken language most French speaking Canadians refer not to the cent or centin, but the "sous". These are small matters and indicative only of some of the special problems of drafting and interpreting legislation in a bi-cultural and bi-national country.

Notwithstanding the inherent difficulties associated with drafting legislation when there are two or more official languages, in some respects the two versions of a statute make the interpretation of legislation easier when one considers that a statute is the formal expression of legislative policy[38] and the dominant purpose in construing any statute is to ascertain the intent of the legislature.[39] In the case of federal and Quebec statutes there are two versions of the legislative policy.

The Civil Code of Quebec, like the Quebec Statutes, has both a French and English language version. Each version is of equal authority and the one may be used to interpret the other. Some guidance as to how the two versions of the Code should be interpreted, is given in article 2615 which provides:

> If any article of this code founded on the laws existing at the time of its promulgation, there be a difference between the English and French texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded; and if there be any such difference in an article changing the existing laws that version shall prevail which is most consistent with the intention of the article, and the ordinary rules of legal interpretation shall apply in determining such intentions.

[36] R.S.C., 1952, c. 315.
[37] R.S.Q., 1941, c. 1, ss. 61-29.
[38] E. A. Driedger, The Composition of Legislation (1957), p. xi.
[39] *Viscountess Rhondda's Claim*, [1922] 2 A.C. 339, per Lord Wrenbury, at p. 397.

Where there is a difference between the two versions, it would appear that the version is to be preferred which is nearest to the old law.[40] It is not, however, a safe rule to lay down that the English version is always to be favoured when it purports to express what came from the English law, or conversely the French version when it gave a rule taken from the French law.[41]

Dean Walton, in his book on *The Scope and Interpretation of the Civil Code of Lower Canada*, makes the point however, that undoubtedly, when a word is used which bears a technical meaning in one of the two languages it ought to be understood in the sense of that language.[42] Thus, in the French version of paragraph 10 of article 1994 of the Civil Code it speaks of "La Couronne pour créances contre ses comptables". The Privy Council described "comptables" to be a technical term of the French law meaning a person liable to account. The "comptables" of the King were the officials who collected and were accountable for the King's revenues. If a "comptable" became insolvent, the King was a privileged creditor. It was held therefore that a bank in which public money was deposited could not be considered to be a "comptable" as it was not a servant of the Crown. It would be only an ordinary contract debtor. The Crown under such circumstances was not a preferred creditor, but must rank with the ordinary creditors.[43]

Paragraph 4 of article 2262 of the Code in the French version limits actions within one year "pour dépenses d'hotellerie et de pension". In a lower court, it was held that this applied whether or not the person was in the business of keeping a hotel or boarding house or was only a private person. In the Court of Appeal it was held that the English version "hotel or boarding-room charges" indicated that the article referred only to claims of those engaged in this business.[44] Similarly it has been held in interpreting the term "injures corporelles" in paragraph 2 of article 2262 of the Civil Code that its natural meaning should be extended by

[40] *Corse* v. *Harrington* (1882), 26 L.C.J. 79, at p. 108, and on appeal *Harrington* v. *Corse* (1882), 9 S.C.R. 412. The reasons for judgment at the trial and in the court of appeal are transcribed in Cases in the Supreme Court of Canada, Vol. XXIV (October 1882).

[41] *Ibid.*, per Ramsay J.

[42] (1907), p. 97 or as Ramsay J. said in *Harrington* v. *Corse*, *ibid.*: "Where the words are purely technical, the original of the technicality, and not the original draft is to be preferred."

[43] *Exchange Bank of Canada* v. *The Queen* (1886), 11 A.C. 157.

[44] *Naud* v. *Marcotte* (1899), R.J.Q. 9 Q.B. 123.

reading it in the light of the expression "bodily injuries" contained in the English version.[45]

Although there is no similar provision to article 2615 of the Code governing the interpretation of either Quebec or federal statutes, the same rules apply. Duff C.J. in *The King* v. *Dubois*[46] held that in interpreting any federal statute, each version of the statute must be considered and neither could be ignored. In the *Dubois* case, the question to be considered was whether or not a government owned motor car while being driven on a highway on government business was a "public work" and were its occupants acting within the scope of their duties or employment, "upon any public work" at the time in question within the meaning of The Exchequer Court Act.[47] Duff C.J.[48] pointed out that the phrase "pendant qu'il agissait dans l'exercise de ses fonctions ou de son emploi dans tout chantier public" is plainly inconsistent with any construction of the phrase "public work" which has the effect of extending its meaning in such a way as to include public services. ". . . 'Chantier' in this connection implies defined area and locality and is incapable of application in such a way as to include public services as such . . . . The statute in the French version, plainly does not envisage a vessel, as such, although it does envisage a shipyard. Nor does it contemplate an automobile as such, although it may very well be held to contemplate an automobile factory."

On another occasion the Supreme Court of Canada reversed a trial and appellate court on the meaning of a section of the English language version of the Copyright Act[49] by examining the French version.[50] Section 17(1)(VII) of the Act provided that among certain acts the following would not constitute an infringement of copyright:

> The performance without motive of gain of any musical work of any agricultural, agricultural-industrial exhibition or fair which received a grant or is held under Dominion, provincial or municipal authority by the directors thereof.

The French version reads:

> L'éxécution sans intention de gain, d'une oeuvre musicale à une exposition agricole, ou à une exposition industrielle et agricole, ou à une foire, qui reçoit une subvention d'une autorité féderale, provin-

[45] *Canadian Pacific Railway Co.* v. *Robinson* (1891), 19 S.C.R. 292, at p. 324 *et seq.*

[46] [1935] S.C.R. 378, at p. 401.

[47] R.S.C., 1927, c. 34, s. 19(c).

[48] *Supra*, footnote 46, at p. 402.

[49] R.S.C., 1952, c. 55.

[50] *Composers Authors and Publishers Association Ltd.* v. *Western Fair Association*, [1951] S.C.R. 596, [1951] 2 D.L.R. 229.

ciale ou municipale ou qui est tenue par ses administrateurs en vertu d'une telle autorité.

In the lower courts the decisions were based on the express view that the "performance" with which the paragraph contemplates is a "performance by the directors" of the exhibition. The Supreme Court of Canada, on the other hand held that when the corresponding section in the French version of the statute was considered the interpretation of the courts below could not stand and that the section should be read as "the performance without motive of gain of any musical work at an exhibition or fair".

In a case[51] that came before the Manitoba Court of Appeal which required it to interpret a section of the Railway Act, there was some doubt as to whether a railroad company was required to pay compensation when it entered upon private property to erect snow fences. The leading case up to that time had been a case based upon the French version of the statute.[52] In his judgment Coyne J.A. discussed the earlier case and relied on it to interpret the English version of the Act in which the intent of the legislature was not as clear. "The *Vezina* case decided in 1937" wrote Coyne J.A., "is based on the French version of the statute enacted by Parliament at the same time as the English version, and it has, of course, equal authority. By its terms the railway company can enter 'sur les terres de la couronne ou sur celles d'un particulier' and erect and maintain snow fences subject to the 'paiement d'une indemnité dans le cas de préjudice à ces terres'. This clearly indicates that when the company exercises these rights and uses part of his lands, the proprietor is to be compensated or indemnified for injurious effect upon his lands."

"The two versions of the [Quebec Motor Vehicles] Act must be read together" said Montgomery J. in *Blouin* v. *Dumoulin*[53] and "I am of the opinion that the word *cause* in the French version must be interpreted in the light of the English version".

An example in federal legislation of an expression clear in one version of a statute and obscure in the other version is the expression "settlement of property" in section 60 of the English version of the Bankruptcy Act[54] which appears as a "disposition de biens" in the French language version. Rivard J. explained that:[55]

> Les termes "disposition de biens" qui dans la Loi sur la faillite, sont

[51] *Stevenson* v. *Canadian Northern Railway Co.*, [1948] 1 D.L.R. 247, at p. 266 (Man. C.A.), 61 C.R.T.C. 209.
[52] *Vezina* v. *C.N.R.* (1937), 75 Que. S.C. 168.
[53] [1958] Que. Q.B. 581. [54] R.S.C., 1952, c. 14.
[55] *In re Evaporateur Portneux Inc.* (1961), 3 C.B.R. (N.S.) 182, at p. 193.

> la traduction des termes anglais *settlement of property* sont étrangers au langage juridique du droit civil de la Province de Québec. Ces termes ne sont pas définis dans la loi de 1949 sur la faillite, qui n'a pas reproduit la définition qu'on trouvait dans la loi sur la faillite en vigeur avant 1949. Ces mots "disposition de biens" ou *settlement of property* impliquent en droit anglais un élément de gratuité qui écarte de leur sens les charges, garanties ou avantages, mentionnés à l'art. 64.

In section 135 of the English version of the Bankruptcy Act, it is provided that a discharge of bankruptcy does not release the bankrupt from any debt or liability for alimony. In the French version of the Act the words "pension alimentaire" are used in place of the word "alimony". Although at first glance a "pension alimentaire" would appear not dissimilar to a "dette alimentaire", the two terms are different and should not be confused with each other.[56]

Statutes which incorporate treaties can give rise to special problems of interpretation. Depending upon whether it is a bilateral or multilateral treaty, it may have two or more authentic texts in as many languages. To implement a treaty, as a rule, federal or provincial legislation is required. Often the treaty is annexed as a schedule to the statute. If one of the authentic copies of the treaty is not in the language of the statute it must be translated. A treaty for example between Canada and Germany could have both an English and German text, each of which is described in the treaty to be equally authentic. If a federal statute[57] was necessary to implement the treaty, a translation of the treaty would be required for the French version of the statute. This version of the statute would be binding upon Canadian courts as each version of a federal statute is of equal authority. As a result, it is possible for a Canadian court to come to a decision based upon a version of a treaty that was not recognized by one of the contracting states. Accordingly, the nature of the rights and liabilities of persons affected by the treaty might be quite different if the matter in dispute was under the jurisdiction of a Canadian court which would be obliged to recognize a non-authentic version of the treaty than if it was under the jurisdiction of an international court which would recognize only the authentic versions of a treaty.

The cases concerning the interpretation of federal and Quebec statutes can be summarized in the following rules:

[56] *Champagne* v. *Rivard* (1954), 34 C.B.R. 173 (Que.).
[57] See for example the Canada-Germany Provisional Trade Agreement Act, 1937, S.C., 1937, c. 20. The concluding paragraph to the treaty which is annexed as a schedule to the Act is: "Done in duplicate in Ottawa in English and German texts both authentic, this twenty-second day of October, 1936."

1. Both the English and French versions must be considered. Neither version can be ignored. Each version is a separate and independent statute of equal authority and the one may be used to interpret the other.
2. Where any statute or part of it is based upon or has its origin in either French or English law that version of the statute shall prevail which is most consistent with the law upon which it is based or has its origin. A sub-rule to this rule is that where a word or expression has a technical meaning in one language, it should be understood in both versions, in the sense of that language.
3. Where the statute being interpreted is not based on either English or French law or a practice or condition not more closely associated with that prevailing in France or Quebec or England or English speaking Canada, the version should prevail which is the closest to the intent of the legislature as ascertained by regular rules of interpretation of deeds and statutes.

IV. *Other Constitutions Providing for More Than One Official Language.*

As has been said, the Canadian experience with two official languages is not unique. There are countries with more than two official languages and there are countries with both official and national languages. Perhaps a record number of official languages is contained in the Charter of the United Nations, which provides that the Chinese, French, Russian, English and Spanish texts of the Charter are equally authentic.[58]

The Swiss federal Constitution provides that the four languages — German, French, Italian and Romanche shall be the "national" languages of Switzerland, but that only German, French and Italian shall be the "official" languages. Any Swiss citizen may petition the government in any of the three official languages and debates in the federal Parliament may be conducted in any of these languages. Similarly any of the three official languages may be used in any pleading or process in the federal courts. The Constitution also provides that all of the three official language groups must be represented on the Swiss High Court. All federal statutes and ordinances are enacted and published simultaneously in the three official languages and each text is of equal authority. If there is any difference between the meaning of the three different versions of a statute, the text which is closest to the meaning and purpose of the law prevails.

[58] Art. III.

Belgium has three linguistic regions and has two official languages: French and Netherlandish.[59] The first linguistic region comprises the Flemish provinces and part of the province of Brabant in which Netherlandish is exclusively used. The second region includes the other part of Brabant and the Walloon provinces where French is used exclusively. The third region around Brussels is bilingual.

Both French and Netherlandish may be used in the Houses of Parliament. Statutes are published in both languages and each version has the same legal authority. Most judges and magistrates in Belgium are bilingual which is of course a necessity for those whose courts are in the bilingual region around the capital. In this area the language of the record is chosen by the parties with the provision that no person can be tried or called to give evidence in a language different than his own. The *Cour de Cassation*, the highest court in Belgium is fully bilingual.

In the Republic of South Africa the two official languages are English and Afrikaans.[60] Section 108 of the Constitution of 1961 specifically provides that:

> (1) English and Afrikaans shall be the official languages of the Republic, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights and privileges.
> (2) All records, journals and proceedings of Parliament shall be kept in both the official languages, and all Bills, Acts and notices of general public importance shall be in both official languages.

All statutes of the Republic of South Africa, are printed side by side on alternate pages in both official languages. This is similar to the publication of the statutes of Quebec, where each version is published in adjoining columns on the same page. Although the South African statutes are published in the two official languages, only one version is signed by the State President. In case of conflict between the two versions of a statute, the version which has

[59] Formerly the two official languages of Belgium were French and Flemish. Flemish was similar to, but not the same as Dutch or Netherlandish. Recently Flemish has become so similar, so as to be almost identical to Netherlandish that Netherlandish has been substituted for the Flemish language in Belgian statutes.

[60] Republic of South Africa Constitution, Act. No. 32 of 1961. Under the former Constitution contained in the South Africa Act the official languages were declared to be English and Dutch with Dutch defined by the Official Languages of the Union Act, Act No. 8 of 1925, as including Afrikaans. The same provision in reverse is now found in s. 119 of the present Constitution which provides that Afrikaans includes Dutch.

been signed by the State President prevails. This is provided for by section 65 of the Constitution which states:

> As soon as may be after any law has been assented by the State President, the Secretary to the House of Assembly shall cause two fair copies of such law, one being in the English and the other in the Afrikaans language (one of which copies shall be signed by the State President), to be enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court of South Africa and such copies shall be conclusive evidence as to the provisions of every such law, and in case of conflict between the two copies so enrolled that signed by the State President shall prevail.

The provision for one conclusive version of a statute is somewhat similar to the Canadian practice under the Act of Union prior to Confederation when there was one official language. It minimizes problems of interpretation and the practice is comparable to modern international treaties where it is not uncommon to provide that one version of a statute shall be the official version and in case of conflict it shall prevail.

In other respects the entrenched provisions of the Constitution of South Africa relating to language go much further than most other countries with two or more official languages. For example, the provisions relating to bi-lingualism in the government service are spelled out in greater detail than one usually finds. All government notices and advertising must be in both official languages and the rules for publication are provided for in some particularity in section 110 of the Constitution which states:

> Whenever anything is published in a newspaper at the instance of the State . . . the publication shall take place simultaneously in both official languages and in the case of each language in a newspaper circulating in the area of jurisdiction of the authority concerned which appears mainly in that language, and the publication in each language shall as far as practicable occupy the same amount of space: Provided that where in the area in question any newspaper appears substantially in both of the official languages, publications in both languages may take place in that newspaper.

V. *Conclusion.*

The Canadian Constitution has been an experiment in uniting the people of two races and cultures to pursue a common destiny. At the same time the union was to permit both cultures—whether it be the language, religion, customs or traditions to flourish. Canada was not to be united in a "melting pot" in the manner of the United States. In this Canada anticipated the era of internationalism, in which the legitimate aspirations of all races and cultures would be respected. In any comparison of the Canadian bi-cultural experience, with other countries it should be remembered that in one respect the Canadian situation is different from that prevailing in Belgium, Switzerland and South Africa. In none of these countries is there a race as isolated as the French speaking Canadians are from their homeland except South Africa and in that country both the English and Afrikaanders are equally isolated in an alien continent.

For a number of reasons the co-existence of the two cultures in Canada has not been as harmonious and rewarding as it was meant and hoped to be. Bi-culturalism and the limited bi-lingualism guaranteed by section 133 of the British North America Act has been a one sided affair. "Both the burden and the benefits of bi-lingualism have been the lot of the French Canadians" is the apt remark of Professor Michael Oliver.[61]

In retrospect and with the experience of one hundred years, some conclusions and suggestions relating to the use of section 133 of the British North America Act can be made:

1. Compliance with section 133 over the years has been marked more by a concern over the letter of the law rather than its spirit. It could have been used in a more positive manner so as to promote a limited national bi-lingualism that in turn would have created a more favourable climate in which our two principal cultures could have flourished more equally.
2. For convenience in comparing the two versions of federal statutes, it would be preferable if they were published in the manner that the statutes of Quebec and South Africa are published with each version of the statute in either parallel columns on the same page or on opposite pages. Such a practice would minimize errors in interpretation and would give tangible recognition to the equal status of each language in federal statutes. Before statutes could be published in this manner, the Act Respecting the Publication of Statutes[62] would have to be amended as it now requires the English and French versions of statutes to be published in separate volumes. An appropriate opportunity to begin publication of the federal statutes with the two versions side by side would be in the next revision of the Statutes

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[61] The Canadian Forum, Nov. 1963, reprinted in Quebec States Her Case (1964), p. 4.
[62] *Supra*, footnote 24.

of Canada which are presently planned to be published in 1966 or 1967.

3. Consideration might be given to amending the Federal Interpretation Act[63] so as to include a section codifying the rules of interpreting statutes published in two versions somewhat similar to the rules of interpretation now found in article 2615 of the Civil Code.
4. To a limited extent the federal government can extend the use of the French language in courts beyond the provisions of section 133 by using the jurisdiction given to it by item 27 of article 91 of the British North America Act. This item gives the right to the federal government to prescribe the procedure to be used in criminal matters. It could order that either the English or French language could be used in any court in any criminal proceedings.
5. As section 133 provides for minimum guarantees only and was enacted at a time when the great majority of French speaking Canadians lived in the Province of Quebec, and there were not any large number of French speaking Canadians in other provinces as there now are, other provinces might consider giving official recognition to the right of any member of the legislature to debate in either the English or French language and might also consider publishing for a start some of the more widely read statutes of the province such as the various Highway Traffic Acts in the French language so that in time any person in any part of Canada may begin to read all laws which affect him in either the English or French language.
6. There are many examples of "anglicisms" and bad translation in the French versions of federal statutes. The commissioners preparing the next revision of the federal statutes should take the opportunity to correct these errors.

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[63] R.S.C., 1952, c. 1.